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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1208

CLARA I. MAYS, *Petitioner,*

v.

WILLIAM T. BURGESS, FRANCES E. BURGESS, H. P. GUMBRECHT, AGNES B. MULARKEY, MARY C. CARLETON, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Clara I. Mays, one of the appellants below, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia (R. 48) which affirmed a final judgment for the respondents, plaintiffs in the original suit, in the District Court of the United States for the District of Columbia (R. 26).

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The Suit and the Parties Thereto.

This proceeding originated as a suit in equity against the petitioner and her immediate predecessors in title for the purpose of setting aside a deed to petitioner because of the provisions of a contract between one of the petitioner's remote predecessors in title and certain neighboring land owners, including three of the respondents and a predecessor in title of the remaining respondent.

Petitioner is a Negro. Prior to the present suit she purchased and became the occupant of an improved parcel of residential property in the District of Columbia, described as Number 2313 First Street, Northwest. She is the holder of record title to the property in fee simple and occupies it as her home. Her grantors and immediate predecessors in title were named as co-defendants in the suit. In this action, the respondents sought and obtained a decree setting aside the deed and conveyance to the petitioner and enjoining her from ownership, use and occupancy of the said premises.

2. Theory and Factual Basis of the Suit.

The essential facts are undisputed. On or about September 1, 1925, the owners of thirty-two parcels of land constituting one city block and located on the east and west sides of First Street, Northwest, between Adams and W Streets, in the District of Columbia, subscribed to a contract under seal, providing in its essential parts as follows:

> "The parties hereto do hereby mutually agree, promise and covenant, each with the other and for their respective heirs and assigns, that no part of the land now owned by the parties hereto, a more definite description of said property being given after the respective signatures hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented or given to

> Negroes or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective parties hereto, their heirs and assigns, for the period of twenty-one years from and after the date of these presents." (R. 4.)

This contract was not a part of or incidental to any conveyance of land. It was recorded in the Land Records of the District of Columbia. Petitioner's property, the subject-matter of the present dispute, is within the area which the contract purports to restrict.

One of petitioner's remote predecessors in title signed the contract. Petitioner purchased the property with knowledge of the existence of the contract. Petitioner has occupied the premises continuously since February 21, 1944.

The area in which the property is located is residential in character. However, most of the parcels covered by the contract in question are no longer occupied by the signatories to the instrument, but are now used as apartment buildings and rooming houses (R. 31). The property in this area has a greater monetary sale value to colored purchasers than to white purchasers (R. 31). The contiguous areas to the south and west are unrestricted and contain numerous parcels owned and occupied by Negroes (R. 25).

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. Code, Sec. 347 (a)).

The judgment sought to be reviewed was entered in the Court of Appeals on January 29, 1945. Petitioner's application for a rehearing was denied on February 16, 1945. The opinion of the Court of Appeals is filed as part of the Record herein (R. 36) but is not yet officially reported.

C.

QUESTION PRESENTED.

Under the Constitution and laws of the United States and consistent with the public policy of the United States and the principles of equity jurisprudence may a court of the United States enjoin a Negro from the use and occupancy of her home and set aside a conveyance to her, solely because of a contract by a remote predecessor in title, to which neither the Negro purchaser nor her grantor was party, purporting to prohibit the disposition of that property to or its occupancy by Negroes?

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the District of Columbia has given improper construction and effect to the decision of this court in *Corrigan* v. *Buckley*, 271 U. S. 323.

2. This case presents a question of general importance which should be, but has not been settled by this Court; namely, whether landowners in the District of Columbia may, by their contract not incorporated in any instrument of conveyance, restrain successors in the chain of title from sale or other dispositions of the land to members of the Negro race, and thus exclude Negroes from the future use, occupancy or ownership thereof, because of their race or color.

3. This case presents a question of substance relating to the Constitution and laws of the United States; namely, whether a racial restriction on alienation and acquisition of land which, under the decision of this Court in *Buchanan* v. *Warley*, 245 U. S. 60, would be unconstitutional if imposed by a legislature, may be imposed by judicial action upon a grantor and a grantee, who have not consented to such restriction.

Each of the foregoing questions was seasonably and properly raised in the District Court and in the Court of Appeals for the District of Columbia, and was considered and decided adversely to the petitioner herein in both of said courts. However, of the three Justices who heard the appeal, only one, Chief Justice Groner, concluded that petitioner's contentions were unsound. Justice Edgerton, in a dissenting opinion, agreed with all of the contentions upon which this petition is predicated. Justice Miller, while concurring with the result reached by the Chief Justice, based his concurrence upon *stare decisis*, expressly recognized the merit of Justice Edgerton's dissent, and stated that "if judicial reinterpretation of the law is now in order, it is the function of the Supreme Court, as the highest Court of the District of Columbia, so to advise us."

In support of the foregoing grounds of application your petitioner submits herewith the accompanying brief setting forth in detail the precise facts and arguments applicable thereto. Petitioner further states that this application is filed in good faith and not for purposes of delay.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia is not yet officially reported but is printed in the record filed in this cause (R. 36).

JURISDICTION.

The jurisdiction of the Court is invoked under Section 240(2) of the Judicial Code (28 U. S. Code Sec. 347 (a)).

The date of the judgment in this case is January 29, 1944

(R. 48). Petition for rehearing was filed within the time provided by the Rules of the United States Court of Appeals for the District of Columbia and was denied on February 16, 1945 (R. 49).

STATEMENT OF THE CASE.

The statement of the case and a statement of the salient facts from the record appear in the accompanying petition for certiorari. Any necessary elaboration of the facts will be made in the course of the argument.

ERRORS BELOW RELIED UPON HERE.

In enjoining a Negro from the use and occupancy of her home and in setting aside a conveyance to her solely because of a contract by a remote predecessor in title purporting to prohibit future disposition of that property to or its occupancy by Negroes, the Court of Appeals erred in that:

I. Improper construction and effect have been given to the decision of this Court in Corrigan v. Buckley.

II. Principles controlling equitable discretion have been violated in a matter of large public concern.

III. The judicial arm of government has imposed racial restrictions which may not under the Constitution and laws of the United States be imposed by a legislature.

ARGUMENT.

I.

The Court of Appeals Has Given Improper Construction and Effect to the Decision of This Court in Corrigan v. Buckley.

The decision below and all other cases in this jurisdiction holding that the courts have the power to effectuate racial restrictive covenants are based upon *Corrigan* v. *Buckley*, 55 App. D. C. 30, 299 Fed. 899; appeal denied 271 U. S. 323.

In the case at bar, Chief Justice Groner stated:

> * * * "we are unable to find anything in the points we are asked to consider which we have not heretofore considered and decided adversely to appellants' contentions. As long ago as 1924, in the case of Corrigan v. Buckley, 55 App. D. C. 30, 299 Fed. 899, we were called on to decide as to the constitutional validity of an identical covenant, and likewise whether such a covenant should be declared to be against public policy. We held in favor of the validity of the covenant and against the claims that its provisions were contrary to public policy. On appeal to the Supreme Court, it was held that neither the constitutional nor statutory questions relied on as grounds for the appeal had any substance or color of merit, or afforded jurisdictional basis for the appeal * * *".

The concurring opinion by Mr. Justice Miller in the instant case relied upon *Corrigan* v. *Buckley*, and at the same time cast doubt upon the soundness of its conclusions:

> "The Supreme Court and this Court have established the law for the District of Columbia as it is set out in the majority opinion, and we are bound to follow it. The considerations urged by Mr. Justice Edgerton are persuasively presented. If proper weight was not given to them in the earlier decisions and if present-day conditions do not justify the position then taken, it has been within the power of Congress to change the law, during all the intervening years. If judicial reinterpretation of the law is now in order, it is the function of the Supreme Court, as the highest Court of the District of Columbia, so to advise us."

Another typical generalization predicated upon *Corrigan* v. *Buckley* appears in *Hundley* v. *Gorewitz*, 77 App. D. C. 48, 132 F. (2d) 23:

> "* * * it must now be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction. Corrigan v. Buckley, 55 App. D. C. 30, 299 Fed. 899. * * * "

In passing it is noted that almost every state decision dismisses the question in the same uncritical fashion, citing *Corrigan* v. *Buckley* as the leading case.

All of these cases, including the decision below, misconstrue *Corrigan* v. *Buckley*, which was decided in this Court solely on the question of jurisdiction to entertain an appeal under Section 250 of the Judicial Code, and in the Court of Appeals upon the postulation of a fallacy.

The facts in the case of *Corrigan* v. *Buckley* are these: Mrs. Corrigan, a white woman, and Mr. Buckley, a white man, were parties to a restrictive agreement. Mrs. Corrigan subsequently entered into an agreement to sell to Mrs. Curtis, a colored woman. Buckley filed suit in equity for specific performance of the agreement against Mrs. Corrigan. The court entered judgment against Mrs. Corrigan, forbidding her to sell to Mrs. Curtis. The case was appealed to the Supreme Court of the United States under the provisions of Section 250 of the Judicial Code. The Supreme Court dismissed the case for want of jurisdiction in these words:

> "And, while it was further urged in this Court that the decree of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the Fifth and Fourteenth Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court; and it is likewise lacking in substance.
>
> "It results that, in the absence of any substantial constitutional or statutory question giving us jurisdiction of this appeal under the provisions of Sec. 250 of the Judicial Code, we cannot determine upon the merits the contentions earnestly pressed by the defendants in this Court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend

its aid by enforcing the specific performance of the covenant. These are questions involving a consideration of rules not expressed in any constitutional or statutory provision, but claimed to be a part of the common or general law in force in the District of Columbia; and, plainly, they may not be reviewed under this appeal unless jurisdiction of the case is otherwise acquired.

"*Hence, without a consideration of these questions, the appeal must be, and is dismissed for want of jurisdiction.*" (Italics added)

So it is crystal clear that this Court did not and could not determine upon the merits of the case, and especially whether these discriminatory covenants were against public policy. Such questions could only be considered if the Court had acquired jurisdiction and had examined the case on its merits. The Court did not consider the question of legal restraint on alienation of land. No question arose concerning a covenant running with the land since the suit was between two parties to a contract. There is not yet any decision of this Court on the merits of these questions, but it is significant that some time later, in the case of *Harmon* v. *Tyler,* 273 U. S. 668, the Supreme Court reversed the judgment of a Louisiana case where the segregation of colored people was attempted by means of powers of sale in deeds and instruments. It is also significant that the Supreme Court of the United States granted certiorari in the case of *Hansberry* v. *Lee,* 311 U. S. 32 when it might have dismissed the case under the rule that ordinary *res adjudicata* is a matter of local law which is left to state courts for their decision. Nevertheless, in *Hansberry* v. *Lee,* the case was reviewed and reversed without remandment.

While the *Corrigan* decision contains an intimation by way of dictum that no substantial constitutional question is presented by the facts of that case, it is to be remembered that this Court was not then committeed to the doctrine that common law determinations of courts can constitute

reviewable violations of the due process clause. But t Court is now committed to that doctrine. *American Feder tion of Labor* v. *Swing*, 312 U. S. 321.

Moreover, the constitutional question urged but not d cided in the Corrigan case, whether due process is denie when a party to a restrictive covenant is prevented fro breaking his promise not to sell to Negroes, is very differ ent from the question here—whether a court denies du process when it makes such an agreement binding on per sons who were strangers to the contract. This was recog nized by Mr. Justice Edgerton, who, in his dissent belo said:

> "It is true than in 1924 in Corrigan v. Buckley, this court restrained a party to a contract like the one be fore us from making a conveyance in violation of his contract. * * * It does not follow that a mere contract like the one before us, against selling land to Negroes, is enforceable against a subsequent owner of the land who has notice of the contract but is not a party to it. Whether it is so enforceable is a question which this court has never had occasion to decide until now. * * * The majority opinion does not and consequently, on analysis, the concurring opinion does not contend that the Supreme Court has determined either the question of particular equities or the question of general policy on which this case turns. If, as the majority say, de cisions of our court have determined these questions adversely to appellants, we should overrule the de cisions. We cannot turn the Supreme Court's power of review into a duty or our duty of reinterpreting the law into a privilege."

Next to be considered is the decision of *Corrigan* v. *Buckley* in the Court of Appeals. Mr. Justice Van Orsdel, speaking for the court, said:

> "* * * The constitutional right of the Negro to ac quire, own, and occupy property does not carry with it the constitutional power to compel sale and convey ance to him of any particular private property. The individual citizen, whether he be black or white, may

refuse to sell or lease his property to any particular individual or class of individuals. *The State alone possesses the power to compel a sale or taking of private property and that only for public use.*" (Italics added) (55 App. D. C. at 31.)

The court had to postulate that hypothetical state of facts and pose a question not in issue to reach its decision. Such a statement is worse than an inverted manner of stating the issues involved; it is utterly without foundation in fact, or reasoning in logic. The use of such devise upon which to base a decision shows how far afield the court had to go and the twisting of facts to achieve a result which is utterly contrary to the plain intent of the Fifth and Fourteenth Amendments, and Sections 1977 and 1978 of the Revised Statutes enacted by the Congress to secure the rights of property to Negroes. There was no question of compelling white persons to sell or rent to Negroes; the question was whether such covenants could be judicially enforced against a party thereto, who despite the covenant wished to sell his property to a Negro.

It must be concluded, therefore, that the issues now before the courts are not decided in *Corrigan* v. *Buckley*, nor is there any significant indication of how they should be decided.

II.

The Decision Below is a Departure From Correct Principles of Equity Jurisprudence in a Matter of Large Public Concern.

A proper exercise of equitable discretion in the light of the anti-social character of the contract here involved and the large actual and potential injury to important public and community interests to be anticipated from the granting of respondents' prayers should have led the courts below to refuse to set aside the conveyances under which petitioner holds title and possession.

A. Applicable Principles of Equity Jurisprudence.

The question of the effect to be given to a racial restrictive agreement purporting to prevent, not only the parties thereto, but their remote successors in title as well, from selling particular land to Negroes lies within the area where equity properly refuses to intervene if an examination of all relevant circumstances, including the position of the parties, the interests of the community and the fundamental policies of the state, shows that the granting of specific redress would be inconsistent with the exercise of sound and reasoned discretion.

A valuable and instructive analogy is presented by those cases in which this Court has concluded that agreements of railroads to maintain certain facilities in a particular place should not be enforced in equity against the contracting railroad or a successor in title. In such a case, *Beasley* v. *Texas & Pacific Ry.*, 191 U. S. 492, 498, Mr. Justice Holmes, speaking for a unanimous court, said:

> "Whether a railroad station shall be built in a certain place is a question involving public interests. Assuming that a contract like the present is valid as a contract, and making the more debatable assumption that the burden of the contract passed to a purchaser with notice, it does not follow that such a contract will be specifically enforced. Illegality apart, a man may make himself answerable in damages for the happening or not happening of what event he likes. But he cannot secure to his contractor the help of the court to bring that event to pass, unless it is in accordance with policy to grant that help. To compel the specific performance of contracts still is the exception, not the rule, and courts would be slow to compel it in cases where it appears that paramount interests will or even may be interfered with by their action. It has been intimated by this court that a covenant much like the present should not be enforced in equity, and that the railroad should be left at liberty to follow the course which its best interests and those of the public demand. . . . If it appears that an injunction would be

against public policy, the court properly may refuse to be made an instrument for such a result, whatever the pleadings. . . . The very meaning of public policy is the interest of others than the parties and that interest is not to be at the mercy of the defendant alone." (at 497, 498.)

The decision in the *Beasley* case was foreshadowed by language in an earlier opinion involving a similar situation, *Texas & Pacific Ry.* v. *Marshall*, 136 U. S. 393, where the Court said:

"But we are further of opinion that if the contract is to be construed as the appellant insists it should be construed (so that the proposed removal of facilities would be a breach) it is not one to be enforced in equity. . . . Both the public convenience and the best interests of the railroad would be sacrificed to a contract which is perpetual . . . It appears to us that if the City of Marshall has under such a contract a remedy for its violation, it is much more consonant with justice that the injury suffered by the city should be compensated by a single judgment in an action at law, and, the railroad be placed at liberty to follow the course which its best interests and those of the public demand. (at 405)

It is petitioner's contention that the present case involves analogous considerations and should be approached by a court of equity in the same way.

B. Controlling Factors of Public Policy Adverse to the Enforcement of Racial Restrictive Covenants.

The following considerations, in application of the foregoing principles to this case, should have been, but were not, given decisive effect by the courts below.

1. The enforcement of racial restrictive contracts in this and in similar cases must actually and potentially cause serious harm to the community by depriving its Negro

citizens of adequate housing and confining them to small and increasingly congested areas to the detriment of their white neighbors as well as themselves. Mr. Justice Holmes' observation that "housing is a necessary of life" (*Block* v. *Hirsh*, 256 U. S. 135, 156 (1921)), states a self evident truth. Equally apparent is the accuracy of the statement quoted by Mr. Justice Edgerton, dissenting in this case, that "Segregation . . . has kept the Negro-occupied sections of cities throughout the country fatally unwholesome places, a menace to health, morals and general decency of cities, and 'plague spots for race exploitation, friction and riots' ". (R. 42.) The critical overcrowding of Washington and the even more critical overcrowding of the restricted Negro-occupied areas of the city are also notorious facts. Congress has recognized the local situation in the District of Columbia Emergency Rent Act of 1941 (55 Stat. 788) which contains the following legislative finding:

> "It is hereby found that the national emergency and the national-defense program have aggravated the congested situation with regard to housing accommodations existing at the seat of government . . . and are making it increasingly difficult for persons whose duties and obligations require them to live or work in the District of Columbia to obtain such accommodations."

The even greater stricture upon Negroes is illustrated by the evidence in the present case which shows that until petitioner and her family moved into a "white" area, thus precipitating the present suit, they had found it impossible to assemble under one roof and had been forced to live apart from each other in several rooming places. (R. 33.) Further documentation of the dangerous conditions existing in the overcrowded "colored" sections of Washington appears in the margin of Justice Edgerton's dissenting opinion. (R. 45-46.) It is a matter of greatest public concern that the health and safety of the community are

thus being jeopardized and the heavy burden of taxation made even heavier by creating and maintaining breeding places of disease and crime. When a court, as in this case, enforces a racial restrictive covenant and by so doing sanctions any and all similar covenants now existing or to be executed in the future, the discretionary power of equity is being exercised to perpetuate and extend a grave social evil. Such action belies both the name and the historic function of equity.

2. Fundamental national policies expressed in the Constitution and laws of the United States are offended by the contract in the present case. In *Buchanan* v. *Warley*, 245 U. S. 60 (1917) this Court decided that legislation imposing residential segregation upon the Negro deprives the landowner of property without due process of law. When a private contract is specifically enforced by a court so as to impose an equivalent restriction upon persons not party to the contract, government has created a rule of judge-made law equally as effective and equally as objectionable as the legislation condemned in *Buchanan* v. *Warley*. The constitutionality of such judicial action is challenged in a subsequent section of this brief. But even before the issue of constitutionality is reached, it is clear that the constitutional prohibition against legislation must at least reflect national policy against the abuse of the discretionary power of the chancellor to accomplish the same result.

National policy is even more explicitly formulated in Section 42 of Title 8 of the United States Code:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The significance of such legislation upon the exercise of judicial discretion in dealing with contracts inconsistent with public policy, thus authoritatively declared, has been stated by one commentator in the following language:

> " . . . the courts will refuse to enforce a contract, not 'because it is illegal' or because the legislature 'intended that a person making such a contract be punished', but because they have satisfied themselves, in the light of what has been indicated to them by legislative bodies, at home or abroad, the contract is against public policy. . . . the courts should frown upon contracts which, though not touching a penal statute, involve other conduct which has been inveighed against by the legislature. What is suggested is not an extension of the scope of judicial disapprobation of contracts, for at all times the courts have freely declared that non-criminal agreements might be against public policy and consequently unenforcible. *What is urged, again, is merely that legislative judgments should be used as indicators of the occasion for employment of the common law rule governing the validity of contracts.*" (Italics added.) Gelhorn, Contracts and Public Policy (1935) 35 Col. L. Rev. 678, 691-2.

3. Additional equitable considerations arise out of facts not common to all restrictive covenant cases but present here. These will be considered in the immediately following sub-section of this brief, wherein the situation presented by this case is distinguished from those presented by other adjudicated cases, including those relied upon by the majority in the opinion below, in the general field of restrictive covenants.

C. Additional Equitable Consideration in This Case Not Involved in Restrictive Covenant Cases Heretofore Adjudicated and Relied Upon Below.

The courts below have decided that it is proper for a court of equity to set aside a conveyance made to a Negro by a landowner who wishes thus to dispose of his property, solely because some former owner of the estate promised his neighbors that the property would not be sold to Negroes. Such precise statement of the issue is of special importance here because it reveals that this case presents, not only the question whether equity should ever enforce

racial restrictive covenants, but also considerations of equitable consequence favorable to the petitioner which have not been decided by this court, or the courts of the District of Columbia, or any state court of last resort. The situations heretofore adjudicated will be classified and their essential dissimilarity to the present case pointed out.

1. This case is unlike those in which relief has been sought against a covenantor who has broken his promise not to sell to Negroes. Such a breach of contract by a promisor was the matter in issue in the District of Columbia decisions upon which the majority have relied as well as in several state decisions. E.g., *Corrigan* v. *Buckley*, 55 App. D. C. 30, 299 Fed. 899, appeal dismissed 271 U. S. 323; *Russell* v. *Wallace*, 58 App. D. C. 357, 30 F. (2d) 981, cert. denied 279 U. S. 871; *Wayt* v. *Patee*, 205 Calif. 46, 269 Pac. 660. Petitioner contends that even in these cases, equity should recognize public policy adverse to such agreements as outweighing the policy of making covenantors generally keep their bargains. But where courts of equity have enforced such agreements, the argument has prevailed that the policy of holding promisors to their bargains was the stronger and controlling policy. Here, however, no one has broken a promise. The considerations of public policy against racial restrictive covenants can be considered and given controlling effect without competition with any countervailing policy.

2. Also distinguishable are the cases which present the issue whether racial restrictive *covenants incorporated in conveyances* may run with the land. E. g.: *Torrey* v. *Wolfes*, 56 App. D. C. 4, 6 F. (2d) 702, also relied upon by the court below. While such covenants in deeds should be denied enforcement in equity for the reasons heretofore stated and applicable to all such covenants, an additional consideration of great importance is presented when an attempt is made to achieve the same result by a simple contract. The practical probability of covenants in deeds

achieving widespread exclusion of Negroes from a community is much less than the danger and likelihood of this result if a simple contract is permitted to run with the land. The normal occasions for conveyances are infrequent and the formal procedures involved are forbidding to the average citizen. But the device of a simple contract or a series of such contracts lends itself to easy and informal restriction of great areas or even an entire community. Pressure of bigoted agitators, the abdication of judgment in the hysteria of a passing period of racial tension, the insistence of one's neighbors that he join with the majority in a neighborhood agreement, all of the psychological factors which lead to capricious and unconsidered mob action, operate effectively to induce the landowner to sign such an agreement. No apparent burden is imposed upon the signer, no substantial change of position is required, no work is entailed. Only the signing of his name on a simple agreement is required. It is surely not the function of equity to make thus easy of accomplishment a restraint on alienation which will bind future owners as well as the unreflecting signer.

3. Decisions involving only restrictions upon use are also to be distinguished from the present restriction upon sale to Negroes. Even where equity has been willing to enforce restrictions on use of land it has not followed that sale might likewise be restricted. Free user is but one incident of ownership. It is substantially less restraint on alienation to cut off this one incident of ownership than to prevent transfer of title itself. Courts sustaining restrictions on use have sharply distinguished such restrictions from restraints on sale. Thus, in *Meade* v. *Dennistone*, 173 Md. 295, 196 Atl. 330, a case upon which the opinion below relies, the court was at pains to make this distinction saying, "the rules against restraints on alienation were only intended to make *conveyancing* free and unrestrained and have nothing to do with use and occupancy" (italics added).

4. The research of counsel has revealed only three cases involving (a) a contract not in a conveyance, (b) restricting sale and ownership and (c) enforced to prevent voluntary sale to a Negro by an owner not party to the contract. One of these, *Lee* v. *Hansberry,* 372 Ill. 369, 24 N. E. (2d) 37, was reversed by this Court (311 U. S. 32) without decision upon the issue here involved. No further proceedings to enforce the covenant in that case appear of record. The second case, that upon which the Illinois decision in *Lee* v. *Hansberry* was predicated, is *Burke* v. *Kleinman,* 277 Ill. App. 519. The records of the Superior Court of Cook County show that the original decree in that case was set aside on it having been revealed that the litigation was fraudulent and collusive.

The third and last decision is *Stewart* v. *Cronan,* 105 Colo. 393, 98 Pac. (2d) 999. However, in that case a Negro purchaser was the moving party seeking affirmative action by a court of equity to quiet his title as clouded by a restrictive contract. The court refused to grant relief. The defendants did not file a cross-bill. Hence, the actual decision is in no way inconsistent with a refusal of equity to act on the petition of a covenantor seeking affirmative relief by way of enforcement of a covenant.

It follows that there is no authoritative precedent in the reported decisions, federal or state, which is not distinguishable from the present situation. Thus, the decision of the court below does not follow any established rule of law. The reluctance of courts to upset settled rules of property law is not a factor in this case. Even the erroneous doctrines under which restrictive covenants have been enforced at times in distinguishable situations have not been applied to upset the titles of Negro landowners in such a case as is now before this Court.

III.

Judicial Enforcement of the Covenant in Question is Violative of the Constitution and Laws of the United States in That the Judiciary Does That Which It Prohibits the Legislature to do, and That It Gives Judicial Sanction to Private Action Which is Criminal Under the Laws of the United States.

When the Government through its courts enforces the type of restrictive covenant herein complained of, it is governmental action proscribed by the Constitution of the United States.

A. The Right to Take and Hold Property is Protected by the Constitution and Laws of the United States.

The right to take and hold property is one of the fundamental and inherent rights and privileges guaranteed by the Constitution of the United States:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several States." Article IV, Sec. 2.
>
> " * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law." Amendment XIV. Sec. 1.
>
> "No person shall * * * be deprived of life, liberty or property without due process of law. * * * ". Amendment V.

While this Court has carefully refrained from attempting to enumerate the several privileges and immunities, it has always recognized the right to acquire, hold, use and dispose of property, both real and personal, as one of those rights. See *Ward* v. *Maryland*, 12 Wall. 418, 430; *The Slaughterhouse Cases*, 16 Wall. 36.

Whether the right to acquire and hold property is a right inherent in state or federal citizenship is beside the point in this case. Whichever it may be, it is guaranteed safety from attack by either the state or federal government under the quoted provisions of the Constitution. See *Buchanan* v. *Warley, supra*; *Harmon* v. *Tyler*, 273 U. S. 668; *City of Richmond* v. *Deans*, 37 Fed. (2d) 712, aff'd 281 U. S. 704.

That the bulwark of these constitutional protections is thrown about the residents of the District of Columbia equally with the citizens of the several states is abundantly clear from *Lappin* v. *District of Columbia*, 22 App. D. C., 68, and *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 Fed. (2d) 246. Moreover this Court has repeatedly held that for the purposes of interpretation and application of the provisions of the Constitution, the District of Columbia is to be treated as one of the States of the Union. *Downes* v. *Bidwell*, 182 U. S. 244; *Geofroy* v. *Riggs*, 133 U. S. 258. It follows then that the prohibitions of the Fourteenth Amendment apply to governmental action in and by the District of Columbia. But if there be any doubt of this, the prohibitions of the Fifth Amendment achieve the same result so far as the national government is concerned.

To make certain that there be no misapprehension about the national policy on this important problem, Congress has not been content to rely upon the protection afforded in the basic framework of the Government. Instead, in order to clearly demonstrate the purpose of the people of the United States that there should be no restrictions placed upon the right of a citizen to acquire and hold property, national legislation was enacted, which makes the right of acquisition of property one that is protected by the laws of the United States as well as the Constitution. In 1866, the following provision was enacted:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed

by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property." U. S. Code, Tit. 8, Sec. 42; R. S. 1798."

The constitutionality of this section has never been challenged.

From the foregoing it must, therefore, be inevitably concluded that the right of the petitioner to acquire, hold and use real property in the District of Columbia is an inherent privilege and immunity of her citizenship.

B. The Government Through the Courts Below Has Been the Effective Agent in Depriving the Petitioner of Her Property.

This proposition is the legitimate and logical consequence of the unanimous decision of the Court in *Buchanan* v. *Warley,* 245 U. S. 60. There it was attempted, by legislation in the form of a city ordinance, to forbid colored persons from occupying houses as residences or places of abode, or public assembly, on blocks where the majority of the houses were occupied by white persons for those purposes, and in like manner forbidding white persons when the conditions as to occupancy were reversed, and which based the interdiction upon color and nothing more. Here the judgments of the District Court and the Court of Appeals, District of Columbia have forbidden Consolidated Properties, Inc., from selling to Mrs. Mays, a colored person, and Mrs. Mays from buying a house in the residential district of Washington solely because she is of Negro race or blood, and have permanently enjoined Mrs. Mays from taking title to this property, from using, occupying, or disposing of it. (R. 27)

The question that was to be determined in *Buchanan* v. *Warley* was thus stated by Mr. Justice Day, page 75:

"The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of *property of which occupancy is an incident,* be inhibited by the

State, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?"

In the course of the discussion of this proposition, it was said:

"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.), 127."

After referring to the authorities and statutes cited by him, Mr. Justice Day very appropriately asked—

"In the face of these constitutional and statutory provisions, can a white man be denied consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?" (at 78)

He answered by saying:

"The statute of 1866, originaly passed under sanction of the Thirteenth Amendment, 14 Stat. 27, and practically re-enacted after the adoption of the Fourteenth Amendment, 16 Stat. 144, expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. Hall v. DeCuir, 95 U. S. 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. (at 78).

The final paragraph of the opinion states the deliberate conclusion of this Court:

> "We think this attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law. That being the case the ordinance cannot stand."

We have, therefore, the solemn pronouncement of this tribunal that it was not within the legislative power of the State, or any of its instrumentalities, to forbid Consolidated Properties, Inc., from selling the house to Mrs. Mays, or the latter from purchasing and occupying it.

For the reasons considered in *Buchanan* v. *Warley*, it would have been beyond the legislative power to have enacted that a covenant in the precise terms of that involved in the present case should be enforceable by the courts by suit in equity and by means of a decree of specific performance, an injunction, and proceedings for contempt for failure to obey the decree. It seems inconceivable that, so long as the legislature refrains from passing such an enactment, a court of equity may, by its command, compel the specific performance of such a covenant, and thus give the sanction of the judicial department of the Government to an act which it was not within the competency of its legislative department to authorize.

But in this case the courts below have gone further. They have not required that parties perform their contracts. They have by judicial action created a rule of property and have made that rule binding upon persons who have not agreed to it. In such circumstances it must be entirely clear that the Government and only the Government is the effective force depriving the petitioner of her property.

We cannot emphasize too strongly that the immediate consequence of the decrees now under review is to bring about that which the legislative and executive departments of the Government are powerless to accomplish. It would seem to follow that by these decrees the petitioner has been deprived of liberty and property, not by individual, but by governmental action. These decrees have all the force of a statute. They have behind them the sovereign power. It is not Burgess, the respondent, but the sovereignty, which speaks through the court, that has issued a mandate to the petitioner which prevents Consolidated Properties, Inc. from selling, leasing or giving its property to Mrs. Mays, and the latter from acquiring and occupying the property, simply because she is of the Negro race or blood.

In rendering these decrees, the courts which have pronounced them have functioned as the law-making power. It is they who are seeking to effectuate the policy of racial segregation based on color. They have virtually announced to all colored persons: "You shall not inherit, purchase, lease, sell or hold real property for the acquisition of which you have entered into a contract, simply because you are of the Negro race or blood." They have told those of the white race who have entered into a covenant such as is referred to in the decree: "You shall not sell, lease, or give your property to any person of the Negro race or blood." They have practically declared: "If the owners of property in a particular locality, however extensive its area may be, see fit to agree on such a policy of segregation, these courts, sitting in equity, may by their decrees enforce such a policy, even if it be conceded that they would be prohibited from doing so by the decision of the Supreme Court of the United States if the legislative branch of the Government had established a like policy."

To test the incongruity of such a situation, let us suppose that after the decision in *Buchanan* v. *Warley*, the Common Council of the City of Louisville had adopted an ordinance permitting the residents of the same districts which were

affected by the ordinance which this Court had declared unconstitutional, to enter into a covenant in the precise terms of that which the courts below have enforced in this case, would it not at once have been said that it was an intolerable invasion of the Constitution as interpreted by this Court. But that is exactly what has been done in the present case by the adjudications which are now here for review.

Or let us suppose, that after the rendition of these decrees, Consolidated Properties, Inc., standing on its constitutional rights, had executed a deed of the premises here in question to Mrs. Mays, and the latter had proceeded to occupy them. At that point the exercise by the court of its power to enforce its decrees through the medium of contempt proceedings, would be the most extreme form of governmental action employed to enforce the policy of racial segregation based on color, in violation of the letter and spirit of the Constitution as interpreted in *Buchanan* v. *Warley*.

Such inconsistency between legislative and judicial action was the subject of the following comment in *Gandolfo* v. *Hartman*, 49 Fed. 181:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restrictive application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while the State and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the State may lawfully do so by contract, which the Courts may enforce. Such view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the court should no more enforce the one than the other. * * * But the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the government, and in violation of the principles embodied in its Constitution. Such a contract is absolutely void and should not

be enforced in any Court, certainly not in a court of equity of the United States." (at 182, 183)
Compare: *Kennett* v. *Chambers*, 14 How. 38.

Therefore, it is respectfully submitted that the enforcement of these covenants by a court is governmental action, which is prohibited by the Constitution of the United States. It is the enforcement of such covenants by judicial officers which violates the Constitution, not the mere making of the agreement by the private land owners.

C. The Covenant in Question is a Criminal Conspiracy, Unenforceable in the Courts of the United States.

The foregoing argument has demonstrated that the right to acquire, use and occupy land, as well as the right to dispose thereof, is one that is protected by both the Constitution and the laws of the United States. (See: *Buchanan* v. *Warley, supra.*) Congress has protected this right by making it a felonious conspiracy to injure or oppress petitioner in the exercise thereof. Section 51 of Title 18 of the United States Code provides:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same—they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any place of honor, profit, or trust created by the Constitution or laws of the United States."

There is no doubt that a written agreement, solemnly executed, and recorded as a deed, by a group of property owners to the effect that a person shall be deprived of his constitutional right to acquire and use property solely because of his race and color, is evidence of the highest order that there has been effected, between the signatories thereto a conspiracy to deprive the person affected of a

right secured to him by the Constitution and laws of the United States.

The specific question at bar has been passed upon by a Federal District Court in Arkansas. In the case of *United States* v. *Morris*, 125 Fed. 322, after showing that by virtue of the Thirteenth Amendment, Congress had the power to enact this legislation regarding the acts of individuals, the court proceeded to discuss the validity of an indictment of certain defendants who had conspired to keep Negroes from the right to lease and cultivate private lands. In an elaborate and scholarly review of the history of the Act, the court came to the conclusion that a mere agreement to keep Negroes out of lands was the very type of act prohibited by the legislation, and concluded:

> "That the rights to lease lands—are fundamental rights inherent in every citizen, is indisputable; and a conspiracy by two or more persons to prevent Negro citizens from exercising these rights because they are Negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and the laws of the United States, within the meaning of Section 5508, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3712)" (at 331)

From this argument only one conclusion can be deduced —the covenant in question constitutes a conspiracy to violate the laws and the Constitution of the United States. May a federal court, acting as an arm of the federal government, lend its aid to the enforcement of a criminal agreement to deprive a citizen of one of her privileges or immunities of citizenship? Only one answer can be given to this question, and this Court has unmistakably given that answer, when, speaking through Chief Justice Taney in *Kennett, et al.* v. *Chambers*, 14 How. 38, it said:

> "The question is—whether such a contract, made at that time, within the United States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such to entitle either party to the aid of the courts of justice of the United States to enforce its execution—."

"for as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass—within the scope of their delegated authority—. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without the breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. *And if he does so he cannot claim the aid of a court of justice to enforce it;—our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes—.*" (at 49,50) (Italics added)

The position here taken by Chief Justice Taney has never been questioned. In fact, it cannot be questioned except by revolution. The signatories to the covenant at bar are likewise parties to Article IV, and Amendments V and XIV of the Constitution and to Sections 41, 42, Title 8, United States Code and Section 51, Title 18, United States Code. They obviously contradict each other and cannot stand together. The lesser indignity, the private agreement, must yield to the paramount authority of their public compact. Any other conclusion is to say that not only will this Court permit respondents to deny their solemn adherence to the Constitution and laws of the United States, but at the same time give their criminal agreement in violation thereof the sanction of a rule of property.

Speculation is unnecessary. The courts of the United States have already spoken on the matter. It has been unanimously held that conspiracies such as here involved cannot be enforced through the medium of the very agencies designed to protect citizens in their privileges and imunities. The leading case is *Gandolfo* v. *Hartman*, 49 Fed. 181.

There the court held that a *covenant restricting the lease of property to others than those of the Chinese race was:*

> " * * * contrary to public policy of the government, in violation of a principle embodied in its constitution. *Such a contract is absolutely void and should not be enforced in any court—certainly not in a court of equity of the United States.* (Italics added)

The principle announced there has been consistently adhered to. Federal courts have repeatedly refused to enforce contracts which embody provisions violative of our Constitution or laws. See: *Fox* v. *Gardner,* 21 Wall. 475; *The Spartan,* 25 Fed. 44; *Ex Parte Reeves,* 121 Fed. 848; *The Fri,* 154 Fed. 333; *Grossman* v. *Union Trust Co.,* 228 Fed. 610; *Lakos* v. *Saliaris,* 116 Fed. (2d) 440. State courts have taken similar views of the problem. See: *Lee* v. *Boise Development Co.,* 21 Idaho 461, 122 Pac. 851; *Porter et al.* v. *Barrett et al.,* 233 Mich. 373, 206 N. W. 532; L. R. A. 1916B, 1208, 1209; 9 A. L. R. 120, *et seq.* The rules of the common law are too well known to require any citations. Individuals never have had the right of absolute freedom of contract in the sense that judicial recognition and enforcement of their private agreements may be had when such agreements run counter to the general welfare and the public policy of the sovereign. Usurious, gambling, immoral contracts ar all illustrative of the principle that the courts will not lend their aid to the enforcement of such agreements.

As is said in *Ex parte Reeves, supra,* to enforce the rights contended for here by the respondents would be to allow the very guardian of our liberties to do that indirectly which they have in solemn form and under highest sanction sworn they would not do directly. The jewel of consistency may not be so tarnished—at least not at the hands of a Federal Court sitting in equity. The right here asserted by petitioner is not hers alone—it is the right of Americans—to preserve the fundamental liberties of all against the tyranny of a temporary majority. Jones, J.,

foresaw this in *Ex parte Reeves, supra,* when he said: (at 856)

> "Is it only the claim of a private individual which is here involved?—The principle here involved affects the rights of millions of parents in this land. The matter is one of highest public concern, in comparison with which the insignificance of the individual or his inconvenience sinks out of sight. Who determines what is to "the interest of the public? What are the souces to which we may resort to ascertain what is public policy, and what it requires?" Assuredly, only the will of the people, as declared in the law of the land."

CONCLUSION.

Wherefore, it is respectfuly submitted that writ of certiorari should issue from this Court to the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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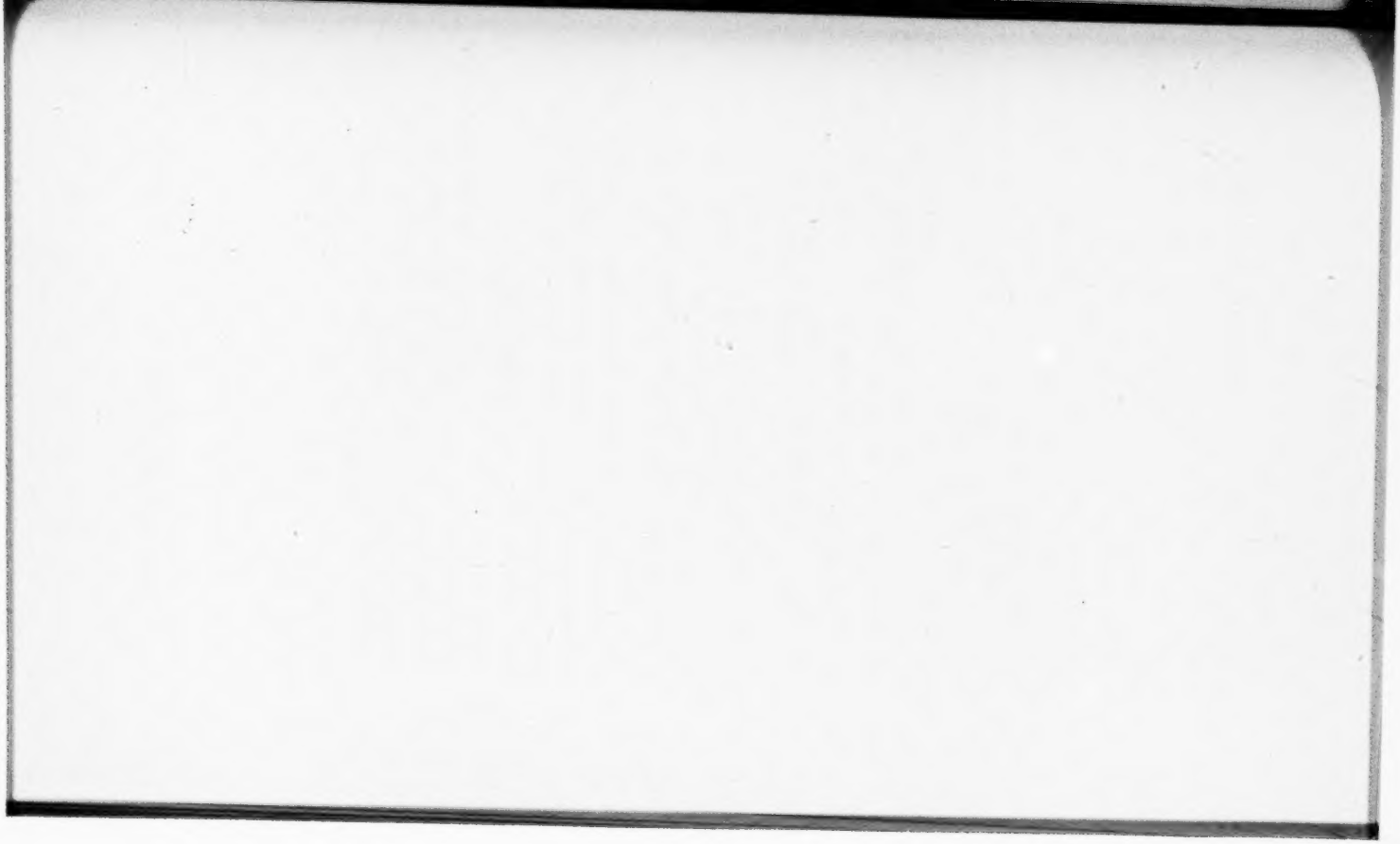

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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1208.

CLARA I. MAYS, *Petitioner,*

v.

WILLIAM T. BURGESS, *et al., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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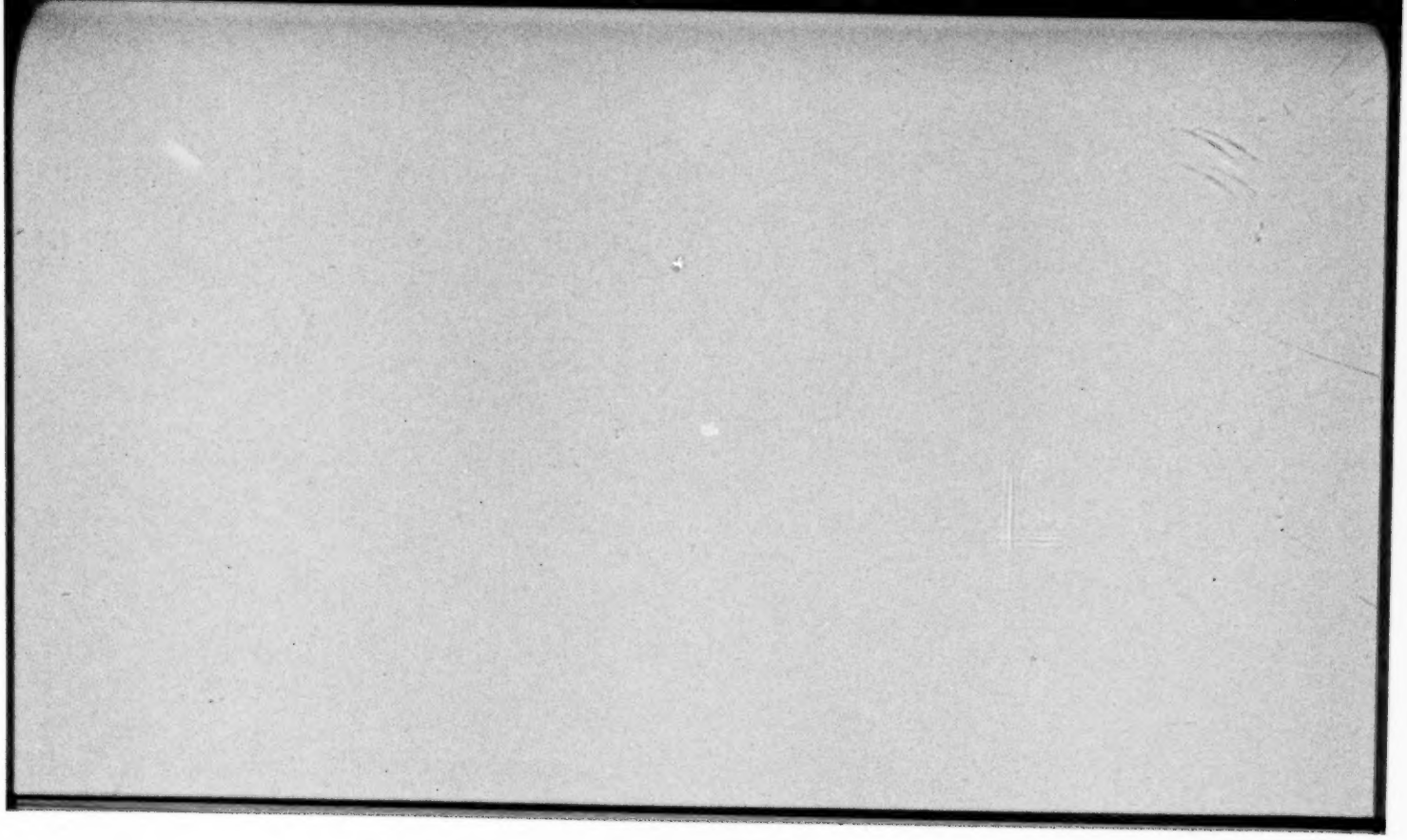

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Statement of the Case.

Respondents deem a brief statement of the case necessary, because the references to the facts in the Petition are incomplete and somewhat misleading.

Three of the respondents personally executed the Indenture dated September 1, 1925, another testified he and his wife purchased their property in 1931 relying upon the protection afforded by said Indenture (R. 34), another testified she had bought her property "about two years ago" relying upon said Indenture, paying $9,500 for it and spending $1,800 in improvements. (R. 34.) Petitioner paid $9950

for the property in suit. (R. 31.) Eighteen of the thirty-two properties are owner-occupied. (R. 34.) The property is in a community of approximately 1000 homes, churches, places of business and schools, all under either deed covenants or similar restrictive agreements on the Negro question, all occupied by persons of the white race and about 80% owner-Occupied. (R. 33, 34.)

Petitioner, a Negro, purchased 2213 First Street, N. W., with actual as well as constructive knowledge of said Indenture, from Consolidated Properties, Incorporated, through Peter T. Stathes, Secretary Treasurer, who conveyed without consideration to Jane Cook, his sister, a "straw" party, for re-conveyance to the petitioner. (R. 23.)

The District Court, after hearing, found that petitioner was a Negro and enjoined her from holding title to or possession of the premises in violation of said Indenture, *its covenant running with the land and binding the respective parties, their heirs and assigns, for 21 years.* (R. 24, 27.) (Italics supplied.) This Judgment was affirmed by the Court of Appeals. (R. 36.)

I. NO CONSTITUTIONAL OR OTHER FEDERAL QUESTION OF SUBSTANCE IS INVOLVED.

No question of substance relating to the construction or application of the Constitution or statutes of the United States is involved in this case.

In Corrigan v. Buckley, 271 U. S. 323, (55 App. D. C. 30) this Court had before it the *identical covenant* involved in this case. This Court had presented to it at length both the presumed questions of constitutional and statutory construction and the question of general law involved, and dismissed the appeal on the ground that no questions were involved under the Fifth, Thirteenth and Fourteenth Amendments to the Constitution, and that the construction of Sections 1977, 1978 and 1979, Revised Statutes of the United

States, was not drawn in question. No action of any public authority subject to constitutional or statutory prohibitions is in any way involved in this case. This Court there said:

> "It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. And, plainly, the claim urged in this Court that they were to be looked to, in connection with the provisions of the Revised Statutes and the decisions of the courts, in determinating the contention, earnestly pressed, that the indenture is void as being 'against public policy,' does not involve a constitutional question within the meaning of the Code provision."

The suggestion made in petitioner's brief (pp. 17 and 23) that there is a question involving the construction of a Federal statute, to wit: section 42, Title 8 of the United States Code (formerly Section 1978 of the Revised Statutes) is entirely without support in the record. This question has not been raised or suggested in the courts below and there is no action of any public authority subject to the terms of the statute in any way depriving petitioner of her right to purchase, sell, and hold real and personal property. The limitation which excluded petitioner, as the Court below held, from holding and occupying a certain piece of property in the District of Columbia was entirely a matter of private contract between adjoining and neighboring land owners.

With reference to a similar contention in Corrigan v. Buckley, *(supra)* this Court said:

> "Assuming that this contention drew in question the 'construction' of these statutes, as distinguished from their 'application,' it is obvious upon their face that while they provide, *inter alia*, that all persons and citizens shall have the equal right with white citizens to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in

> respect to the control and disposition of their own property. There is no color for the contention that they rendered the indenture void; nor was it claimed in this Court that they had, in and of themselves, any such effect."

And, as the Court of Appeals so aptly states in the pending case, (R. 39):

> "In the intervening twenty years (since the Supreme Court's decision in the Corrigan-Buckley case) the question under similar facts has arisen in at least five additional cases;[1] and in the last named of these, the Hundley case, which was decided less than two years ago, we said that, in view of the consistent adjudications by this Court that a covenant against Negro ownership or occupation is valid and enforceable in equity by way of injunction, it must now be conceded to be the settled law in this jurisdiction."

II. NO QUESTION OF LARGE PUBLIC CONCERN IS INVOLVED.

Petitioner apparently contends in her brief that the question of whether this Indenture is void because contrary to the public policy of the District of Columbia is a question of large public concern which has not been, but which should be decided by this Court, under correct principles of equity jurisprudence, and cites: 1. two railroad cases covering the removal of railroad facilities, decided in 1890 and 1903 by this Court, involving alleged analogous considerations; 2. inadequate housing and social conditions; 3. remoteness of parties signing the Indenture; and 4. so-called fundamental national policies expressed in the Constitution and laws of the United States.

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[1] Torrey v. Wolfes, 56 App. D. C. 4, 6 F. (2d) 702
Russell v. Wallace, 58 App. D. C. 357, 30 F. (2d) 981
Certiorari denied: 279 U. S. 871
Cornish v. O'Donoghue, 58 App. D. C. 359; 30 F. (2d) 983
Certiorari denied: 279 U. S. 871
Grady v. Garland, 67 App. D. C. 73, 89 F. (2d) 817
Certiorari denied: 302 U. S. 694
Hundley v. Gorewitz, 77 App. D. C. 48, 132 F. (2d) 23.

(a) The Covenant is Not Against the Public Policy of the District of Columbia.

The question of whether this indenture affected a certain piece of real estate located in the District of Columbia and was enforceable by injunction against persons occupying said land in violation of the indenture is one of local law, and the only public policy involved is that of the District of Columbia. A decision on the question cannot have any effect on the law of real property which may be located in other states or jurisdictions. While there is no substantial diversity in the various states, each state court has treated the question as one of the local law of real property, to be governed by its own principles. *There are no conflicting Federal decisions on the question, and it arises in the U. S. Court of Appeals for the District of Columbia only through the local jurisdiction of that court and not as involving any Federal right.* (Italics supplied.) The public policy of the District of Columbia, like that of any state affecting such questions, is that fixed by applicable statutes and declared by the highest court of the jurisdiction. What its public policy is and what does or does not conflict with it, cannot be a question of general importance. See Hartford Fire Ins. Co. v. Chicago, etc. Ry., 175 U. S. 91, 100.

The Court of Appeals of the District of Columbia is the highest court of an important and thickly populated territorial subdivision of the United States. Congress through the Judicial Code, Section 240 (28 U. S. Code Sec. 347 c) has seen fit to make its judgments final and not reviewable by writ of error or appeal, but only by certiorari, thus making its decisions on questions of local law, such as are involved in this case, equivalent to similar decisions of the highest courts of the states.

Respondents respectfully call the Court's attention to the following excerpt from the decision of the Court of Appeals in this case (R. 40):

"Little need now be said on the subject of that (public) policy. The proposition is not new and was unsuccessfully urged in the Corrigan case, *supra*, in this court and in the Supreme Court. And nothing is suggested now that was not considered then. The Constitution is the same now as then, and we are cited to no new public laws, nor indeed to any other course or practice of Government officials, which the *private* action of the original owners of the block in question contravenes. And the public policy of a State of which courts take notice and to which they give effect must be deduced—in the main—from these sources. Surely it may not—properly—be found in our personal views on sociological problems. As to the District of Columbia, we must take judicial notice of the fact that separate schools are established for the white and colored races; separate churches are universal and are approved by both races; and that in the present local housing emergency, large amounts of public and, perhaps also, of private funds have been expended in the establishment of homes for the separate use of white and colored persons. And these accepted practices are not intended to and should not be considered to imply the inferiority of either race to the other."

(b) THE INDENTURE DOES NOT CONSTITUTE AN UNLAWFUL RESTRAINT ON ALIENATION.

Petitioner in her brief seems to have abandoned the contention, urged in the lower courts, that the Indenture (or Restrictive Agreement) constitutes an unlawful restraint on alienation. Respondents therefore merely call attention to the opinion of Mr. Justice Fields in Cowell v. Colorado Springs Co., 100 U. S. 55, 25 L. Ed. 547, sustained in Potter v. Couch, 141 U. S. 296, 315, and cited in all cases on this subject; the restrictive covenant here involved, and similar deed covenants, do not constitute an unlawful or undue restraint on alienation.

III. ACTION IN THE COURTS IS PROPER AND ESSENTIAL FOR LAW-ABIDING CITIZENS TO OBTAIN EQUAL PROTECTION OF THE LAWS.

Petitioner urges that the courts cannot enforce such restrictive agreements, because the Judiciary is a branch of the Government, and cite in support of the proposition the case of Buchanan v. Warley, 245 U. S. 60, a Kentucky case. There appears to be no need to do more than quote the portion of the opinion conceded by petitioner to state the issue, and observe that reliance on this case makes it obvious that appellants have "misconceived the real question here involved":

> "The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, *be inhibited by the State, or by one of its municipalities,* solely because of the color of the proposed occupant of the premises?" (Italics supplied.)

The contention is not new. In 1924 this proposition was urged in the Corrigan-Buckley case, *(Supra)*, and as late as 1942 the appellants in Hundley v. Gorewitz, *(Supra)* made the same contention, and again in the instant case before the Court of Appeals. Although urged strongly in each case, the point was ignored by the Court.

While it may be argued that courts will not recognize or enforce contracts against public policy, in the absence of such objection the courts are the only place where law abiding citizens may obtain equal protection of the laws and save themselves from being deprived of their property without due process of law. This is exactly what the respondents here did when they filed this suit to enforce their contract. We quote from the opinion of the Court of Appeals (R. 39, 40):

> "In the case we have the parties, as they declared, contracted for their mutual benefit and in the interests of the neighborhood not to permit their land to be sold

to, or used by, persons of the Negro race, and made this covenant binding upon their heirs and assigns. The form of the covenant is immaterial and it is not necessary it should run with the land. 'A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding upon him merely because he stands as an assignee of the party who makes the agreement, but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform.' *Bryan v. Grosse*, 155 Cal. 132, 99 P. 499. And likewise in *Codman v. Bradley*, 201 Mass. 561, 87 N. E. 591, it was said:

> 'It is plain from the language of the indenture that the parties intended a restriction upon each of the five lots in favor of the owners of lots 176 and 177, and their heirs and assigns, which should be for the benefit of the lots, whoever might be the owners of them. It is equally plain that equity will enforce such a restriction. It is not important to determine whether the instrument created a legal estate in the five lots, or precisely what legal estate is created, if any. It created a right enforceable in equity against all persons taking with notice of it, actual or constructive, and this equitable right is in the nature of an easement, even if it rests on no broader principle than that equity will enforce a proper contract concerning land, against all persons taking with notice of it. [Citing cases.] In the present case it plainly appears that the intention of the parties was that their respective promises should be for the benefit of the promisees as owners of the neighboring land, and of subsequent owners of these lots. Such a promise may always be enforced in equity by an owner.' "

Petitioner further urges that not only is a restrictive agreement of the kind involved here invalid for the assigned reasons, but that property owners, attempting "in any legitimate way" to secure their property rights, are guilty of conspiracy "to injure, oppress, threaten or intimidate" her. She cites Section 51, Title 18, of the U. S. Code as authority. At most, reference to this criminal statute can only be urged in support of the claim that such restrictive agreements are repugnant to the Constitution and

violative of the statutes enacted to implement constitutional rights. This Court, in Corrigan v. Buckley, *(Supra)*, and the Court of Appeals, in that and all subsequent cases on this subject, have uniformly held that "the statutes, therefore, can afford no more protection than the Constitution itself. If, therefore, there is no infringement of defendant's rights under the Constitution, there can be none under the statutes."

There is no Federal decision in support of petitioner's contentions. Gandolfo v. Hartman, 49 Fed. 181, in the Southern District of California (1892) does not deal with the principles bearing on restrictions upon alienation at all, but relies upon the terms of a treaty between the United States and China, and is contrary to the decision of this Court in Corrigan v. Buckley, *(Supra)*. Nor has any State decision been cited which cannot be differentiated from the case before the Court in this petition.

IV. THE DECISION OF THE COURT BELOW IS CORRECT AND IN ACCORD WITH THE DECISIONS OF THIS COURT.

The decision of the U. S. Court of Appeals for the District of Columbia not only agrees with the settled rule of property in this District, established by many prior decisions, but is in agreement with the settled principles of law applicable which have been recognized from the time of Lord Coke to the present. The decision below agrees exactly with the cases in this Court, above cited, which have dealt with this question. Moreover, three times this Court has denied Certiorari, since its decision in Corrigan v. Buckley, *(Supra)*, when Petitions involving the identical or similar restrictive covenants, have been sought *(Supra)*.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

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(18)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1208

CLARA I. MAYS,
Petitioner,

v.

WILLIAM T. BURGESS, *et al.*,
Respondents.

PETITION FOR RECONSIDERATION OR REHEARING AND REASONS THEREFOR

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Respondents.

PETITION FOR A RECONSIDERATION OR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner herein and presents this petition for a reconsideration or rehearing and for the vacating of the judgment of this Court denying her Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia.

JURISDICTION

The judgment of this Court herein prayed to be reconsidered was entered on the 28th day of May, 1945. This petition for a reconsideration or rehearing is filed within twenty-five days from May 28, 1945, in accordance with Rule 33 of this Court.

REASONS FOR PETITION

I. Denial of certiorari here must leave the law of the District of Columbia on an issue of great importance settled not according to the independent judgment of the Court of Appeals but through misapprehension that controlling views have heretofore been expressed by this court.

In this case below, two of the three Justices of the Court of Appeals for the District of Columbia, Chief Justice Groner and Justice Edgerton, were sharply and irreconcilably divided on the question whether law and public policy permit the enforcement of racial restrictive covenants against persons not party thereto. Therefore, the vote of the third member of the Court, Justice Miller, became decisive on an important issue which had not theretofore been adjudicated in the District of Columbia. Justice Miller's brief concurring opinion was in the following language:

> *"The Supreme Court and this Court have established the law for the District of Columbia as it is set out in the majority opinion and we are bound to follow it. The considerations urged by Justice Edgerton are persuasively presented. If proper weight was not given to them in the earlier decisions and if present-day conditions do not justify the position then taken, it has been within the power of Congress to change the law, during all the intervening years. If judicial reinterpretation of the law is now in order, it is the function of the Supreme Court, as the highest Court of the District of Columbia, so to advise us."* (R. p. 41.) (Italics added.)

Thus, although the contention of Justice Edgerton appealed to the reason and judgment of Justice Miller, his erroneous belief that the Supreme Court—apparently in *Corrigan* v. *Buckley*—had sanctioned a doctrine so broad as to cover this case prevented him from exercising that judgment and impelled him to follow his mistaken interpretation of views heretofore expressed by this Court. Upon

such a determination a precedent of great importance now rests and an issue of the largest public significance becomes decisively adjudicated, so that the ever substantial barrier of *stare decisis* compromises its reexamination. This barrier is made all the more substantial here because the refusal of this Court to review this decision can and will be construed as meaning that the Court of Appeals is correct in reasoning that *Corrigan* v. *Buckley* is controlling in this case. It is significant and petitioner believes it appropriate for this Court to consider that within hours after the denial of certiorari in this case the action of the Court was broadcast over the radio and was headlined and featured as front page news in the Washington daily papers. The fact, rather than the substance of such comment, indicates the large public significance of any disposition of this case. The peculiar combination of circumstances here creates a situation in which a matter of great moment is permitted to become settled law without any such exercise of appellate judgment upon the merits of the controversy as the system of appellate review contemplates. It is submitted that this anomalous situation in itself should persuade this Court to reconsider its denial of certiorari.

II. The constitutional issues presented are substantial and should be disposed of only after full argument and consideration on their merits.

Without repeating the argument in petitioner's brief, it is urgently requested at this time that the Court consider the relation of its decision in *Harmon* v. *Tyler*, 273 U. S. 688, invalidating an ordinance prohibiting sale or lease of property to Negroes in any "community or portion of the city * * * except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the city" (*Tyler* v. *Harmon*, 158 La. 439, 104 So. 200) to the present case where the courts of the District of Columbia are setting aside such a sale because of an agreement formerly made by certain inhabitants of the community.

These two situations should be compared in the light of the doctrine of *American Federation of Labor* v. *Swing*, 312 U. S. 321, and *Cantwell* v. *Connecticut*, 310 U. S. 296, that judge-made rules of substantive law like statutes may constitute state action within the meaning of the constitutional restraints applicable to the state. Here the judge-made, and thus state created, rule of property enforced against persons who never agreed to such a restriction is the equivalent of the state created and enforced restriction which this Court invalidated in the Harmon case. Certainly such apparent inconsistency merits judicial review in this Court.

The substantial character of this constitutional question and the outline of the arguments with reference thereto have been presented in petitioner's brief (pp. 22-23). It is a coincidental but significant commentary upon the substantial character of these issues and their current importance throughout the country that since the preparation of petitioner's brief, the same constitutional issues have been the subject of serious and responsible analyses in two of our leading national legal periodicals. See McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional* (1945) 33 Calif. L. Rev. 5; Kahen, *Validity of Anti-Negro Restrictive Covenants; A Reconsideration of the Problem* (1945) 12 U. of Chi. L. Rev. 198. These articles not only indicate the substance and importance of the constitutional arguments against restrictive covenants, but also how nation-wide misconception of *Corrigan* v. *Buckley* has distorted the law in this area.

III. The granting of certiorari here would be consistent with similar action by this Court in cases involving issues of local concern in the District of Columbia.

In *District of Columbia* v. *Murphy*, 314 U. S. 441 (1941), this Court granted certiorari (313 U. S. 556) to review a determination of the United States Court of Appeals for the

District of Columbia as to what constitutes domicile in the District of Columbia under common law principles. The issue arose under a local tax law applicable solely to the District and the only controverted question was whether the taxpayer had acquired a domicile in the District. It is difficult to imagine a controversy more localized in significance or a legal issue more plainly involving only a simple common law determination. This court granted certiorari "because of the importance of the questions involved." (314 U. S. at 449.)

It cannot be more important to people residing in the District of Columbia to have the Supreme Court expound the principles under which the domiciliary status of immigrants should be determined than to have the validity of ghetto creating, health impairing, crime breeding racial zoning considered and, after full argument, adjudicated by the Supreme Court.

Perhaps the most extreme recent case in which this Court has exercised discretionary review of a District of Columbia decision is *Best* v. *District of Columbia*, 291 U. S. 411 (1934), certiorari granted, 290 U. S. 619. The question there was simply whether the facts stated in the opening statement of plaintiff's counsel in a tort claim for negligent injury brought the case within the tort doctrine of "attractive nuisance." This Court seems to have deemed the outlining of the scope of the attractive nuisance doctrine in the District of Columbia a matter of sufficient moment for the granting of certiorari. The incalculably greater moment of the issues now presented is too apparent to require argument.

Again, in *Loughran* v. *Loughran*, 292 U. S. 216 (1934), certiorari granted, 290 U. S. 621, an issue solely of local law was reviewed. Without reaching any constitutional issue, this Court undertook to determine whether as a mixed matter of conflict of law principle and interpretation of the local divorce laws, a foreign marriage, after a District of Columbia divorce prohibiting remarriage, gave dower rights in

real property located in the District of Columbia. The question was the effect of a marriage upon property rights in the District of Columbia. Yet, it is submitted that more persons are likely to be affected and more seriously, and issues of larger public concern with reference to property rights are involved here where racial restrictive covenants are elevated to the status of property rights running with the land and made binding upon the world, than in the *Loughran* decision as to the dower rights of certain re-married divorcees in the District of Columbia.

Even this Court's most recent statement of reluctance to review District of Columbia decisions of exclusively local character is made in a case where the policy was disregarded, although the controversy was of only local concern. See *District of Columbia* v. *Pace*, 320 U. S. 698, 702 (1944).

Thus, even apart from the national significance of the issues here, within the policy heretofore manifest in granting certiorari to the Court of Appeals for the District of Columbia on local matters, this Court can, with propriety and consistency, review the judgment of which petitioner complains.

Beyond this, however, it is to be emphasized that the question of equity jurisprudence and property law here involves housing, a prime necessity of life, and depends for its solution upon a question of public policy to which the Constitution and laws of the United States furnish the guide and key. (See Petitioner's Brief herein, 11, 15-18.) Such a matter, even in its local aspect in the District of Columbia is so tied in with national law and policy as to merit decision by this Court.

IV. The demonstrable consequences of racial zoning by restrictive covenants are so grave in the District of Columbia and throughout the country that this Court should not refuse to adjudicate the issue as here presented.

While the wide extent and serious consequences of racial restrictions upon the ownership and use of housing were discussed in the dissenting opinion below (R. pp. 45-47) and outlined in petitioner's brief (pp. 16-17) here, the matter is so grave that a more detailed presentation seems appropriate at this time. The use of racial restrictive covenants has spread to the extent that Negroes in the major cities of the nation are restricted to insufficient space to allow for decent living and normal expansion. The result is excessive crowding of dwellings and congestion of neighborhoods with consequent deterioration, blight and slums, with the universally known baneful effects upon the economic, social and moral structure of not only the Negro segment of the population, but also of the entire community.

The United States Census of 1940 examines the characteristics of 19 million urban dwellings. The census classifies a dwelling as overcrowded if it is occupied more than 1½ persons per room. On this basis 8 percent of the units occupied by whites are classified in the 1940 census as overcrowded, while 25 per cent of those occupied by non-whites are so classified. In Baltimore, Maryland, Negroes comprise 20 percent of the population yet are constricted in 2 percent of the residential areas. In the Negro occupied second and third wards of Chicago, the population density is 90,000 per square mile, exceeding even the notorious overcrowding of Calcutta.

A similar situation exists in Washington where the Negro population has doubled since 1930. The 1930 Census showed 132,068 Negroes in the District of Columbia. The generally accepted present estimate of the Negro population is between 250,000 and 275,000. And while the increase in the white population has been cushioned in some measure by

the development of new areas in the District of Columbia and nearby Maryland and Virginia, the Negro continues to be restricted, largely under the impact of restrictive covenants, to intolerably overcrowded ghettos. Indeed, demolition of public buildings and roads and a limited slum clearance program without attendant development of new areas avaliable for Negro occupancy have tended to constrict the Negro population of to-day within an even smaller area than that already overcrowded by a population half as large in 1930. So serious are these strictures that although Congress directed the closing of all Washington alley dwellings by 1944, this period has already been twice extended because the super saturated Negro areas and restrictions upon other areas leave no alternatives but to permit the alley dwellers to remain where they are or put them in the streets. There can be no relief for this situation so long as racial covenants place artificial yet impassable boundaries around the existing areas of Negro occupancy.

The local situation in 1944 is thus summarized in "Race Relations in the Nation's Capital", Annual Report of Citizens Committee on Race Relations:

> "The housing situation is so bad as to rank as the No. 1 social problem of the community—
>
> "The problem has been aggravated by a tendency to condemn slums without providing equivalent housing facilities for the Negro tenants thus evicted. It has been further complicated by a tendency on the part of government officials to tear down Negro dwellings to make possible the erection of government buildings without making any provision whatever for the Negro residents thus deprived of a place to live. * * * And it is still further complicated by what may be the most serious factor of all, the scarcity of new land in the District for Nergo homes and a tendency on the part of white citizens to resist the movement of Negroes into what they consider to be their areas. The result is that the Negroes are squeezed tighter into a few little 'islands' within the District, and the squeezing process threatens

even to squeeze out these islands and drive the Negroes beyond the limits of the District of Columbia. This poses a social problem of the greatest magnitude and difficulty, and no solution is yet in sight."

Competent professionals working in the housing field repeatedly have pointed out the social cost and public injury which resulted from these restrictions. Thus, John J. Blandford, Jr., Administrator of the National Housing Agency, speaking in Columbus, Ohio, on October 2, 1944, had this to say:

"I do not need to tell you of the difficulties we encountered even after we could establish the need of migrating Negro war workers. We met troubles from the start of the war housing job, but they were multiplied every time we tried to build a project open to Negroes. These difficulties—of site selection, of obtaining more 'living space'—were deep-rooted and had to be overcome, one by one. And delays only made more desperate the plight of both those who migrated to take war jobs and those already living in war industry centers.

"The average citizen knows generally that restrictions on Negroes abound, just as he knows slums abound in our major cities. But does he know that, as in those cities, there's hardly a decent piece of land a Negro can build on in his own home town? Does he know that new living space is imperative because the present limited spaces are crowded to the point that disease and crime ultimately will be bred there—if it doesn't already exist? Does he know how the concentration of war industries has affected the lives of Negroes who have lived a few blocks away from his own home for years—now crowded together as never before—or the newcomers who have been forced upon them? Well, if not, the facts must be told and told again as facts about his home town—not of cities far away.

"The core of the housing problem of Negroes is, of course, more living space."

To the same effect is the comment of the Commissioner, Federal Public Housing Authority, Philip M. Klutznick, in his article, *Public Housing Charts Its Course,* published in Survey Graphic for January, 1945:

> "But the minority housing problem is not one of buildings alone. More than anything else it is a matter of finding space in which to put the buildings. Large groups of these people are being forced to live in tight pockets of slum areas where they increase at their own peril; they are denied the opportunity to spread out into new areas in the search for decent living.
>
> "The opening of new areas of living to all minority groups is a community problem. And it is one of national concern."

This is not a new situation, but it is becoming more aggravated from year to year. As far back as 1928 one of the most discerning writers in this field clearly pointed out what was happening and its social dangers:

> "Congestion comes about largely from conditions over which the Negroes have little control. They are crowded into segregated neighborhoods, are obliged to go there and nowhere else, and are subjected to vicious exploitation. Overcrowding saps the vitality and the moral vigor of those in the dense neighborhoods. The environment then, rather than hereditary traits, is a strong factor in increasing death-rates and moral disorders. Since the cost of sickness, death, immorality and crime is in part borne by municipal appropriations to hospitals, jails and courts, and in part by employers' losses through absence of employees, the entire community pays for conditions from which the exploiters of real estate profit." Woofter, Negro Problem In Cities (1928) at 95.

It is also widely recognized that these anti-social covenants are not characteristically the spontaneous product of the community will, but rather result from the pressures and calculated action of those who seek to exploit for their

own gain residential segregation and its consequences. This process has been aptly described by Woofter, *op. cit. supra* at 73:

> "The riots of Chicago were preceded by the organization of a number of these associations (neighborhood protective associations); and an excellent report on their workings is to be found in *The Negro in Chicago*, the report of the Chicago Race Commission. The endeavor of such organizations is to pledge the property holders of the neighborhood not to sell or rent to Negroes, and to use all the possible pressures of boycott and ostracism in the endeavor to hold the status of the area. They often endeavor to bring pressure from banks against loans on Negro property in the neighborhood, and are sometimes successful in this.
>
> "The danger in such associations lies in the tendency of unruly members to become inflamed and to resort to acts of violence. Although they are a usual phenomenon when neighborhoods are changing from white to Negro in northern cities, no record was found in this study where such an association had been successful in stopping the spread of a Negro neighborhood. The net results seem to have been a slight retardation in the rate of spread and the creation of a considerable amount of bitterness in the community." Cf. Embree, Brown Americans (1943) at 34 reporting 175 such organizations in Chicago alone. James M. Haswell, in a featured article in the Detroit Free Press for March 17, 1945, estimates 150 such organizations are functioning in Detroit.

The same thesis with reference to the City of Detroit was recently elaborated by Dr. Alfred M. Lee, Professor of Sociology at Wayne University:

> "Emphasizing overcrowding and poor housing as one of the major causes of racial disturbances, Lee declared that in his opinion real estate dealers and agents have been doing more to stir up racial antagonisms in Detroit than any other single group.
>
> " 'These men (real estate dealers),' Lee said, 'are

the ones who organize, promote and maintain restrictive covenants and discriminatory organizations. I am convinced that once it is possible to break the legality of these covenants, a great deal of our troubles will disappear.' As reported in The Michigan Chronicle for May 9, 1945."

In somewhat more legalistic analysis, such concert and agreement on area restrictions, supported by the courts, create conditions of monopoly and restraint of trade with reference to the essential commodity of housing. In an artificially restricted market the Negro not only finds housing scarce, he also gets less housing value for his dollar than the unrestricted white citizen who can trade in a free market. The following table extracted from the 1940 Census is a comparison of whites and non-whites paying identical rents in the District of Columbia and showing how much worse housing the non-whites get for the same money.

DISTRIBUTION IN RENTAL VALUE GROUPS AND RELATIONSHIP BETWEEN RENTAL GROUPS AND CONDITION OF DWELLINGS, BY RACE OF OCCUPANTS, FOR THE DISTRICT OF COLUMBIA.[1]

Estimated Monthly Rental Value	All Occupied Units				Substandard Dwelling Units[2]				
	White		Non-White		Number		Percentages of Total Units Occupied by Respective Racial Groups		
	Number	Distribution	Distribution	Number	White	Non-White	White	Non-White	Ratio between Percentages
All Occupied Units Reporting State of Plumbing and Repairs	124,194	100.0	100.0	36,853	15,683	14,860	12.6	40.3	3.2
Under $5	91	.1	.3	99	46	87	50.5	87.9	1.7
$ 5 - $9	168	.1	1.7	635	116	616	69.0	97.0	1.4
$10 - $14	592	.5	8.4	3,111	478	2,874	80.7	90.4	1.1
$15 - $19	1,427	1.1	11.3	4,164	1,094	3,404	76.7	81.7	1.1
$20 - $24	3,386	2.7	12.1	4,444	2,320	3,171	68.5	71.4	1.0
$25 - $29	5,305	4.3	12.6	4,640	2,695	2,276	50.8	49.1	1.0
$30 - $39	20,388	16.4	21.3	7,848	5,075	1,576	24.9	20.1	1.2
$40 - $49	24,901	20.1	15.9	5,854	2,095	514	8.4	8.8	1.0
$50 - $59	23,039	18.6	8.8	3,245	930	205	4.0	6.3	1.6
$60 - $74	19,881	16.0	5.2	1,932	465	98	2.3	5.1	2.2
$75 - $99	13,884	11.2	1.8	672	238	32	1.7	4.8	2.8
$100 and Over	11,132	8.9	.6	209	131	7	1.2	3.3	2.8

[1]SOURCE: Sixteenth Census of the United States, Vol. III, Housing, "Characteristics by Monthly Rent or Value," Tables A-2, A-3, and A-5a.
[2]Units needing major repairs or with plumbing deficiencies.

In August 1944 the conservative Journal of Land and Public Utility Economics published this commentary on the characteristic economic pattern of artificial over valuation in the "Negro market" as controlled by residential segregation.

> "There are no conclusive studies of the influence of Negro occupancy upon property values. There is, however, strong evidence in everyday observations to support Moron's contention that 'smart real estate dealers have encouraged Negroes to move into old white neighborhoods where property values have begun to decrease. In the change of settlement the same houses automatically acquire a higher resale value or command higher rentals; while, in the case of rent property, the assessed valuation for tax purposes continues to decrease as if there had been no reversal of the income trend.' The owners in a transitional area have a monopoly on the available supply; this means * * * that the selling price is usually above the market value prior to Negro occupancy. * * * In American cities the Negro has become a handy dumping ground for obsolescent property. * * * These families usually pay excessive prices for houses which have become obsolete * * *." See Weaver, *Racial Restrictive Housing Covenants*, 30 Journal of Land and Public Utility Economics (1944), 183, 190.

It is difficult to conceive of an economic and social situation involving more critical issues of public welfare or in which it is more important that the intervention of inferior courts to perpetuate and extend a grave evil should be reviewed by this Court.

Better homes make for a better type of citizen, and the development of the highest possible type of citizen is a principal concern of the state. As good homes are vacated for better homes a process of civic development occurs. The citizen by means of industry and thrift works and aspires to acquire a better home and ultimately the best for his family. This process in a free market and a prosperous

economy should eventually eradicate substandard living conditions which are not merely a rebuff to our civic pride, but a positive menace both to public health and safety.

To permit white citizens by agreement among themselves to deprive colored citizens of their rightful participation in this process would be gravely hurtful to the public welfare and at the same time would stimulate antipathy existing between the races. Those of the dominant race afflicted with race prejudice would become more arrogant and more oppressive in their consciousness and exercise of power, while the unfortunate victims would lose faith and hope in the protection and force of the supreme law of the land, the impartial administration of justice by our courts, the conscience of the dominant race and the righteousness of the nation. It would undoubtedly produce a situation of ever-increasing contempt for the weak on the part of the strong and more bitter hatred of the strong on the part of the weak.

No more important question can be presented to this Court. The direct interest of one-third of the population of the District of Columbia, and more than fifteen million citizens of the country at large, is at stake, and with it the basic welfare of all.

In their effort to rise from slavery to equality with their fellow men, colored citizens are everywhere met by the effort to keep them down, and to deny them that equal opportunity which the Constitution secures to all. If they can be forbidden to live on their own land, they can be forbidden to work at their own trade. If this is possible, the prejudice against which the war amendments were framed to defend the colored people triumphs over them, and the amendments themselves become dead letters.

CONCLUSION

Petitioner believes that this case presents both a substantial question of equity jurisprudence and a substantial constitutional contention not heretofore adjudicated by this

Court, and that this case involves interests of the greatest public concern. It is submitted that final disposition of such a matter should not be by summary denial of certiorari without full argument or consideration of the issues on their merits. For the foregoing reasons petitioner respectfully urges that a rehearing be granted and that the judgment of May 28, 1945, denying certiorari be set aside.

Respectfully submitted,

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